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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BIBIANO MOLINA, Defendant and Appellant.	B232838 (Los Angeles County Super. Ct. No. VA094706)

APPEAL from an order of the Superior Court of Los Angeles County, Marcelita V. Haynes, Judge. Dismissed.

Andres Z. Bustamante for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Jason C. Tran and David C. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

Bibiano Molina appeals from the denial of his nonstatutory motion to vacate the guilty plea he entered in 2006 to one count of possession of cocaine. Molina contends his counsel was ineffective in failing to advise him of the immigration consequences of his plea, and, if he had been properly advised, he would not have pleaded guilty to the charge. Because the motion, properly considered a petition for writ of *coram nobis*, fails to state a prima facie case for relief, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Molina's Guilty Plea and Deferred Entry of Judgment*

On April 11, 2006 Molina, a citizen of Mexico who had lived in the United States for 22 years, pleaded guilty to the charge of possession of cocaine, a controlled substance. (Health & Saf. Code, § 11350, subd. (a).) Molina acknowledges he was advised by the court of the immigration consequences of his guilty plea, including that a guilty plea could result in his deportation, exclusion from admission to the United States or denial of naturalization. Molina told the court he understood the admonitions and signed an advisement form to that effect. The court accepted the plea and, at Molina's request, placed Molina on a program of deferred entry of judgment pursuant to Penal Code section 1000.1[1] for a period of 18 months pending his completion of a drug treatment program and substance abuse counseling.

On October 17, 2007 the trial court found Molina had successfully completed the requirements of the deferred entry of judgment program and dismissed the charge against him pursuant to section 1000.4.[2]

On January 6, 2011 Molina filed a "nonstatutory motion to vacate plea or sentence on constitutional grounds of ineffective assistance of counsel." Molina alleged on February 2, 2009 the United States Department of Homeland Security denied his request

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1 Statutory references are to the Penal Code unless otherwise indicated.

2 Section 1000.4, subdivision (a), provides "Upon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred. . . ."

for permanent residency on the ground he had twice pleaded guilty to possession of a controlled substance[3] and asserted his counsel had failed to advise him of the immigration consequences of his guilty plea. The trial court denied Molina's motion.

DISCUSSION

A nonstatutory motion to vacate a judgment and set aside a plea is the legal equivalent of a petition for a writ of error *coram nobis.* (*People v. Kim* (2009) 45 Cal.4th 1078, 1086 (*Kim*); accord, *People v. Shipman* (1965) 62 Cal.2d 226, 229, fn. 2.) To obtain the writ, the petitioner must show, among other things, """that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment."""" (*Kim,* at p. 1102, quoting *Shipman,* at p. 230.) "New facts that would merely have affected the willingness of a litigant to enter a plea or would have encouraged or convinced him or her to make different strategic choices or seek a different position, are not facts that would have prevented rendition of the judgment." (*Kim,* at p. 1103.)

Although Molina's brief in this court does not refer to *Kim, supra,* 45 Cal.4th 1078, that case is controlling. There, the defendant, a Korean citizen, brought a nonstatutory motion to vacate a judgment and set aside a prior guilty plea after his sentence had been served and his parole period completed on the ground his counsel had failed to advise him at the time he entered his plea that it could result in adverse immigration consequences, including his deportation. The Supreme Court held a claim that counsel was constitutionally ineffective for failing to advise the defendant as to the immigration consequences of his or her plea does not state a case for relief on *coram nobis.* (*Kim,* at p. 1104 ["[t]hat a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule"; "any violation in this regard should be raised in a motion for a

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3 At the time of his 2006 plea, Molina had a prior conviction for possession of a controlled substance.

new trial or in a petition for a writ of habeas corpus"]; see *People v. Banks* (1959) 53 Cal.2d 370, 377-378 [*coram nobis* relief unavailable when defendant with knowledge of the facts enters a plea because of ignorance or mistake as to the legal consequences of the plea]; *People v. Gari* (2011) 199 Cal.App.4th 510, 521 [a petition for a writ of error *coram nobis* is "not available to [a] defendant, based on his unawareness of the immigration consequences of a prior guilty plea and on his contention his counsel was ineffective by failing to investigate and to negotiate a different plea"].)

Molina devotes much of his appellate brief to arguing the dismissal of the charges pursuant to the program of deferred entry of judgment should not leave him without a remedy to challenge his plea, which had the unknown, adverse consequence of denying him permanent residency. The contention is incorrect. The trial court did not deny the motion on the ground the charges had been dismissed, but on the entirely proper ground he had not satisfied the prerequisites for nonstatutory relief.

Correctly observing the writ of habeas corpus is unavailable when, as here, the defendant is no longer in actual or constructive custody (see *Kim*, *supra*, 45 Cal.4th at pp. 1105, 1108; accord, *People v. Villa* (2009) 45 Cal.4th 1063, 1066), Molina urges there must be an equitable remedy in these circumstances, whether it be the writ of error *coram nobis* or some other form of relief. The defendant in *Kim* made the same argument, asserting that some form of post-judgment, post-custody relief is necessary in these circumstances "to ameliorate the harshness of the situation in which fundamental constitutional violations have occurred [i.e., ineffective assistance of counsel] but will go unremedied because the offender is now out of custody and unable to seek relief on habeas corpus." (*Kim*, at p. 1105.) The Court rejected the argument. It observed that, in addition to other forms of relief, such as a new trial motion and habeas corpus petition while the defendant is still in actual or constructive custody, the Legislature has also provided for other post-judgment/custody statutory relief in certain circumstances. (*Id.* at pp. 1105-1106, citing §§ 1016.5 [authorizing individuals to move to set aside plea at any time on ground court did not advise him or her of the immigration consequences of guilty plea; 1473.6 [defendants convicted in part by false testimony of government agents may,

even if no longer in custody, move to vacate the judgment]). Any expansion of post-judgment and post-custody remedies, it concluded, is the province of the Legislature, not the courts. (*Kim,* at p. 1107 ["[b]ecause the Legislature remains free to enact further statutory remedies for those in defendant's position, we are disinclined to reinterpret the historic writ of error *coram nobis* to provide the remedy he seeks"].)

Because the claim asserted by Molina is not properly raised by a petition for writ of error *coram nobis* or a nonstatutory motion to vacate the judgment, the appeal must be dismissed. (See *People v. Totari* (2002) 28 Cal.4th 876, 885, fn. 4 ["[i]n an appeal from a trial court's denial of an application for the writ of error *coram nobis*, a reviewing court initially determines whether defendant has made a prima facie showing of merit; if not, the court may summarily dismiss the appeal"]; *People v. Dubon* (2001) 90 Cal.App.4th 944, 950 ["trial court's denial of a *coram nobis* petition is an appealable order, unless the *coram nobis* petition failed to state a prima facie case for relief"].)

DISPOSITION

The appeal is dismissed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.